ILLINOIS INDEPENDENT

TAX TRIBUNAL

DALISAY SULIT, Petitioner,	)	
v.	)	15 TT 236
	)	Judge Brian F. Barov
ILLINOIS DEPARTMENT OF REVENUE, Respondent.	)	

FINAL JUDGMENT ORDER

The Illinois Department of Revenue issued two Notices of Penalty Liability under section 3-7(a) of the Uniform Penalty and Interest Act, 35 ILCS 735/3-7(a), against Dalisay Sulit, M.D. ("Petitioner") for failing to pay Illinois income withholding tax as a responsible officer of Alliance Home Healthcare Agency, Inc. ("Alliance"). The first Notice, issued on October 6, 2014, assessed unpaid income withholding tax against the Petitioner for all four quarters of the 2013 calendar tax year and the first quarter of the 2014 calendar tax year. The second Notice, issued on January 9, 2015, assessed unpaid income withholding tax for the second and third quarters of 2014. On October 3, 2019, a final hearing was held on the matter. After considering the testimony, documentary evidence submitted by the parties, and oral and written arguments, I find that the Petitioner is a responsible party and is liable for the assessed unpaid withholding tax.

Background

The Petitioner incorporated Alliance in 1994. Tr. 15; Dep't Ex. 3.[1] For all the tax periods in issue, she was the corporation's president, a member of the board of directors, and the corporation's majority owner. Tr. 16, Dep't Ex. 3-4; Stip. ¶¶ 6-8. She held a 69.5% ownership interest in the company. Tr. 16, 55; Stip. ¶ 8. Her late husband, Dr. Reynaldo Sulit, served as vice-president, and her son, Reginaldo Sulit, was secretary-treasurer. Tr. 16-17; Dep't Ex. 3. Reginaldo held a 5.5% interest in the company. Tr. 75.

In addition to holding the office of president, the Petitioner was also Alliance's administrator. Tr. 16; Dep't Ex. 17. In this capacity, before the tax years in question, she worked full time managing the business. Tr. 25-27. She not only supervised the nurses who provided home health care but also reviewed medical records, paid bills and managed the company's finances, with the assistance of Reginaldo and Alliance's accountant. Tr. 25-28, 77-78.

In April 2012, the Petitioner was diagnosed with breast cancer. Tr. 17-18; Pet'r Ex. 1. She had surgery in June 2012, followed by chemotherapy and radiation therapy. Pet'r Ex. 1 at 10-13; Tr. 18. The cancer and its treatment led to further medical complications, further hospitalization and additional surgery in October of 2012. Tr. 17-19, Pet'r Ex. 1 at 14-22. The Petitioner was left physically debilitated, in constant pain, weak and fatigued. Tr. 20-22; Dep't Ex. 13 at ¶ 3.

In October 2012, the Petitioner turned over her administrative duties at Alliance to Reginaldo. Tr. 63-64, 80-81, 96. There was no formal transfer of power to him. Tr. 63-64. This change was communicated to staff informally at an employee's meeting, either verbally or by circulating a written memorandum. Tr. 63-65, 96-97.

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[1] Citations to the transcript of the report of proceedings of the administrative hearing are cited as "Tr.__." The hearing exhibits admitted for the Petitioner are cited as "Pet'r. Ex. __." Those admitted for Department are cited as "Dep't Ex. ___." The stipulation of uncontested facts, included as part of the final pretrial order, is cited as "Stip. __."

As administrator, Reginaldo managed Alliance's day-to-day operations, including its tax and financial matters. Tr. 78-80, Dep't Ex. 13 at ¶ 11. The Petitioner never resigned her title because, according to Reginaldo, "we were hopeful she would recover," and did not "believe it was necessary." Tr. 86. According to Petitioner, she never resigned her position as corporate president because she "did not know that [she] need[ed] to." Tr. 34; *see also* Tr. 33. In addition to remaining corporate president, the Petitioner retained her majority interest in Alliance, Stip. 6-8, Tr. 34, 55.

In January 2013, the Petitioner returned to work "no more than 3 days a week" handling clinical and regulatory matters. Tr. 81-82; Dep't Ex. 13 at ¶ 3. In 2013, Petitioner's salary was reduced to reflect her diminished role in the company, as well as Reginaldo's attempt to "improve the balance of the budget." Tr. 87-88. Despite the reduction in her role, during the 2013 and 2014 tax periods at issue, the Petitioner and Reginaldo met regularly–at least quarterly–to discuss Alliance's business and finances. Tr. 102-03; Dep't Ex. 13 at ¶ 22. These meetings, at which Alliance's business problems were discussed, were also attended by the company's bookkeeper, accountant and other company officers. Tr. 66, 101-03; *see also* Dep't Ex. 13 at ¶ 19.

Petitioner initially denied awareness of unpaid withholding taxes, Tr. 32, but on cross-examination admitted that Reginaldo made her aware of the withholding tax liability, and that she saw the Department's notices regarding them, Tr. 53-54; Dep't Ex. 13 at ¶ 19. She was aware that a Medicare audit resulted in a freeze of about $400,000 in reimbursements to Alliance. Tr. 67; Dep't Ex. 13 at ¶ 19. The Petitioner was aware that Reginaldo was meeting with bank officials to discuss Alliance's financial situation. Tr. 67-68. She knew that Reginaldo had hired a marketing consultant to increase the number of patients and was trying to cut expenses to increase Alliance's cash flow. Tr. 66- 67; Dep't Ex. 13 at ¶ 19.

When asked by this court whether she was aware that bills were not being paid in 2013, the Petitioner responded that she contributed her own funds to Reginaldo because she knew the company was "having problems." Tr. 67.

Petitioner volunteered that she paid a nurse's salary out of her own funds because she knew that Alliance did not have sufficient funds to pay her due to the dispute with Medicare. *Id.*

The Petitioner retained check-writing authority during the tax periods in issue and continued to write checks at Reginaldo's direction. Tr. 84-86; Dep't Ex. 7, 13 at ¶ 17; Pet'r Ex. 2. The Petitioner signed 53 checks during the tax periods in issue, which amounted to less than 1% of the checks issued during those tax periods and for about 1% of the total value of checks written during the tax periods. Dep't Ex. 7; Pet'r Ex. 2.

In February 2014, in her capacity as Alliance's president, the Petitioner signed and submitted a Statement of Change of Registered Agent to the Office of the Illinois Secretary of State, naming Reginaldo as the corporation's new registered agent. Dep't Ex. 4, 12. In June 2014, the Petitioner established a new operating bank account for Alliance, over which she and Reginaldo had signature authority. Dep't Ex. 7.

According to Reginaldo, it was his decision alone, and not Petitioner's, to not pay withholding taxes to the Department. Tr. 79-80. Reginaldo has also been personally assessed for underpaid withholding taxes by the Department. Tr. 89-90. In addition, he was criminally indicted, convicted and incarcerated for not paying withholding taxes to the Department. Tr. 90-93; Pet'r Ex. 7. In December 2016, Alliance ceased business operations. Stip. ¶ 2.

Analysis

The Illinois Income Tax Act requires Illinois employers to withhold and remit to the State of Illinois income tax on compensation paid to employees. *See* 35 ILCS 5/701-706. Under the Uniform Penalty and Interest Act ("Act"), 35 ILCS 735/3-7(a), a corporation that incurs a tax liability, but fails to remit those funds, subjects its responsible officers or employees to personal liability, including interest and penalties for the unpaid amounts. *See Cerone v. State*, 2012 IL App (1st) 110214, ¶ 14.

Section 3-7(a) of that Act states:

> Any officer or employee of any taxpayer subject to the provisions of a tax Act administered by the Department who has the control, supervision or responsibility of filing returns and making payment of the amount of any trust tax imposed in accordance with that Act and who wilfully fails to file the return or make the payment to the Department or wilfully attempts in any other manner to evade or defeat the tax shall be personally liable for a penalty equal to the total amount of tax unpaid by the taxpayer including interest and penalties thereon.

35 ILCS 735/3-7(a). While the Act is titled as a "penalty," it is not actually a penal statute but rather provides a mechanism for the government to collect outstanding tax liabilities by imposing liability on those responsible for failing to pay the corporation's taxes. *See Monday v. United States*, 421 F.2d 1210, 1216 (7th Cir. 1970).[2]

Section 3-7(a) liability is "derivative in nature" arising where the corporation has incurred a tax liability that it does not pay. *McLean v. Dep't of Revenue*, 326 Ill. App. 3d 667, 673-74 (1st Dist. 2001). There are two prongs to section 3-7(a) liability: (1) it is "imposed . . . upon corporate officers or employees who are responsible for the filing of . . . tax returns and payment of taxes due," and (2) the responsible

[2] Section 3-7(a) conforms closely to the federal tax penalty provision found at 26 U.S.C. § 6672. Illinois courts and the parties have relied on federal decisions applying section 6672, *see McLean*, 326 Ill. App. 3d at 677; Pet'r Post-Hr'g Mem. at 2-3; Dep't Post-Hr'g Br. at 2-3, and pertinent federal cases are cited in this decision.

parties must have "'willfully' failed to file such returns or remit such taxes." *Id.* at 674.

The Department's certified record of the Notice of Penalty Liability satisfied its prima facie case for proving responsible officer liability. *See Branson v. Dep't of Revenue*, 168 Ill. 2d 247, 257-58, 262-63 (1995); *McLean*, 326 Ill. App. 3d at 674. The prima facie case created a presumption that the person named is a responsible person and had willfully failed to pay the amount of the taxes due. *Branson*, 168 Ill. 2d at 262. The prima facie case is rebuttable where the taxpayer provides "sufficient evidence" to disprove that the named official qualifies as a responsible person or willfully failed to file returns and pay taxes. *Id.*; *Cerone*, 2012 IL App (1st) 110214, at ¶ 15.

The Department argued that the Petitioner's burden required her to provide documentary evidence to rebut the penalty assessment and her failure to provide such evidence fails to overcome the Department's prima facie case. Dep't Post Hr'g Br. at 5 (citing *Mel-Park Drugs, Inc. v. Dep't of Revenue*, 218 Ill. App. 3d 203, 217 (1st Dist. 1991) (stating "[t]o overcome the Department's *prima facie* case, a taxpayer must present more than its testimony denying the accuracy of the assessments but must present sufficient documentary support for its assertions."). *Mel Park Drugs* involved a challenge to a sales tax deficiency assessment made after an audit and restates the burden generally imposed on taxpayers necessary to rebut the accuracy of such an assessment. *See id.* Illinois courts have not expressly adopted this rule in section 3-7(a) cases. Rather, Illinois courts use the term of "sufficient evidence," *see Branson*, 168 Ill. 2d at 262, and have considered testimony alone or together with documentary evidence in determining whether the Department's prima facie case has been rebutted, *see id.* at 263-64; *see also Cerone*, 2012 IL App (1st) 110214, at 18-19; *McClean*, 326 Ill. App. 3d at 674-75.

Although the Department's view of the law is doubtful, it makes no difference for this case. This decision–that Petitioner did not meet her burden of proof– is supported by the testimony of the Petitioner and Reginaldo, as well the documents submitted by both parties. There is no material inconsistency between the

testimony and documentary evidence nor is there any uncorroborated exculpatory testimony that I have had to reject to reach a decision here.

A. The Petitioner Qualifies as a Responsible Person.

Responsible person status is not limited to any one corporate official. *See Monday*, 421 F.2d at 1214-15; *Peterson v. United States*, 758 F. Supp. 1209, 1215-16 (N.D. Ill. 1990). It may extend to corporate officers beyond those who directly participate in preparing and filing tax returns. *Cerone*, 2012 IL App (1st) 110214, at ¶ 19. Any person with "significant control and authority" over a firm's business may be a responsible person liable under section 3-7(a) of the Act. *Id.*

Significant control and authority over company business does not mean absolute control, final control or exclusive control. Liability attaches to any and all persons with power and responsibility within the corporate structure for seeing "that the taxes withheld from various sources are remitted to the Government." *Monday*, 421 F.2d at 1214. Liability turns on whether a corporate official had the "authority to direct that taxes be paid," not whether her "job called upon [her] to exercise that power." *Davis v. United States*, 2018 WL 1173149, at *3 (D. Col. 2018) (emphasis in original); *see also Monday*, 431 F.2d at 1214. No single fact is dispositive, but the facts supporting a conclusion that a corporate official is a responsible person includes ownership of significant amounts of stock, the authority to sign checks on corporate accounts or prevent their issuance by denying a necessary signature, the authority to hire and fire employees, control over employees' pay, the authority to enter into contracts on behalf of the corporation, to make decisions regarding the finances of the corporation, and to prepare corporate tax strategies. *Monday*, 421 F.2d at 1214-15; *Peterson*, 758 F. Supp. at 1216.

Not all of these factors are present in this case. However, the evidence showed that through the tax periods in question the Petitioner was the majority shareholder and thus retained control of the company and had the power to direct its affairs. *See Monday*, 421 F.2d at 1215; *Larson v. United States*, 76 F. Supp. 2d 1092, 1097 (E.D. Wash. 2000) (emphasizing plaintiff's "absolute power as majority shareholder to control all operations of the corporation" as key factor in finding him

a responsible party). She was not merely a passive investor or an official who did not participate in financial decision-making. *See, e.g.*, *McLean*, 326 Ill. App. 3d at 674-75 (majority shareholder not a responsible party for period in which he was an investor with no day-to-day management involvement in the corporation). Rather, Petitioner was in the office on a regular basis and regularly attended meetings with Reginaldo, the company's accountants and other corporate officials at which she was updated on the company's finances. Tr. 81-82, 101-03; Dep't Ex. 13 at ¶¶ 19, 22. She was aware of Alliance's financial problems and Reginaldo's attempts to solve them. Tr. 66-68. She witnessed Reginaldo's meeting with bankers; she discussed with Reginaldo Medicare's freeze on payments to Alliance and his plan to hire a marking firm to boost patient revenue. Tr. 66-67; Dep't Ex. ¶ 13 at 19. Petitioner saw the tax notices from the Department, and she was aware that Alliance was not paying its withholding taxes. Tr. 53-54, 66-68; Dep't Ex. 13 at ¶ 19.

Knowing these problems, Petitioner also continued to provide Reginaldo with personal funds for the business. Tr. 67. She even paid a nurse's salary out of her own pocket, when she knew that Alliance could not meet its payroll. *Id.* Further, Petitioner also continued to exercise her corporate authority throughout the tax period in question by opening a new checking account, adding Reginaldo as the corporate agent, and signing checks. Dep't Ex. 4, 7, 12.

There are facts that cut in her favor. Petitioner reduced her regular involvement in and regular oversight of Alliance as a result of her illness, and when she returned to work it was largely in a clinical, not administrative, capacity. Tr. 81-82. Even though she retained check writing authority, the amount of checks that she wrote was small and was done at Reginaldo's direction. Tr. 84-86, Dep't Ex. 7, Pet'r Ex. 2. But these facts do not detract from her absolute power over Alliance's business affairs and continuous involvement in its financial decision making.

This case is similar to *Cerone*. There, the taxpayer owned a restaurant and delegated purchasing, bill paying, and taxes to a manager. *See*, *e.g.*, *Cerone*, 2012

IL App (1st) 110214, at ¶ 3. But he held a 75% controlling interest in the restaurant, visited it frequently, spoke with the manager about business affairs and was involved in key business decisions. *Id.* at ¶ 19. He was aware of the business's financial problems and that bills were not being paid in a timely fashion, and, thus, found to be a responsible officer. *Id.* Just as in *Cerone*, the Petitioner here had sufficient knowledge, control and authority over Alliance's business affairs to qualify as a responsible officer.

The Petitioner's reliance on *Turpin v. United States*, 970 F.2d 1344 (4th Cir. 1992) for the proposition that her controlling interest should be accorded little weight is not persuasive.[3] In that case the appellate court upheld a jury's verdict that the taxpayer was not a responsible party because in answering a special interrogatory the jury found the taxpayer did not act willfully. *Id.* at 1350 n.2. The case did not address the responsible person analysis. *Id.* It should be noted though, that the *Turpin* jury found that the taxpayer was a responsible officer for the period of time that he was the controlling shareholder, but not for the period of time that he was not the controlling shareholder. *See* 970 F.2d at 1346. The case does alter the conclusion reached here that Petitioner's status as a majority shareholder coupled with her continuous involvement in Alliance's financial decision making qualified her as a responsible officer.

B. The Petitioner Willfully Failed to Pay Taxes.

In order to impose personal liability, it is not sufficient that Petitioner was a responsible party, she also must have acted willfully in failing to remit withholding income taxes. Willfulness does not require a showing of fraud, bad intent, or even actual knowledge of nonpayment. *See Branson*, 168 Ill. 2d at 255; *McLean*, 326 Ill. App. 3d at 675-76. A responsible person acts willfully when she is "in a position to

[3] Given the importance accorded Petitioner's position as the controlling shareholder in reaching the decision, the court asked Petitioner to provide supplemental authority to address this matter. The cases cited by Petitioner do not require extended discussion as only *Turpin* clearly involved a controlling shareholder. *See* Pet'r Mem. of Law Addressing Supplemental Authority at 3 & Ex. B.

easily discover nonpayment [and] clearly ought to have known of a grave risk of nonpayment but does nothing." *Estate of Young v. Dep't of Revenue*, 316 Ill. App. 3d 366, 375 (1st Dist. 2000). This standard has been described as "reckless disregard for obvious or known risks." *Branson*, 168 Ill. 2d at 255 (internal punctuation omitted). A responsible person acts willfully, if she fails to investigate or to correct mismanagement after having notice of nonpayment of withholding taxes; or knows of the business's financial troubles but continues to pay other creditors without making reasonable inquiry as to the status of the withholding taxes. *See Branson*, 168 Ill. 2d at 255; *Cerone*, 2012 IL App (1st) 110214, at ¶ 22.

Delegating tax paying duties to other corporate officials or employees does not absolve a responsible officer of personal liability. *See Cerone*, 2012 IL App (1st) 110214, at ¶ 22. More than one responsible party can be held liable for a willful failure to pay withholding taxes. *See McLean*, 326 Ill. App. 3d at 677.

The same facts supporting a finding that Petitioner was a responsible person also supports a finding that she acted willfully. She was aware not just of Alliance's financial problems but also of the fact it that it was not paying its withholding taxes. She saw the notices from the Department. Tr. 53-54; Dep't Ex. 13 at ¶ 19. She was aware of the dispute with Medicare and that employees were not being paid. Dep't Ex. 13 at ¶ 19; Tr. 67. She was at the business up to three times a week, and she met with Reginaldo and other corporate officials regularly to discuss the company's business affairs. Tr. 102-03; Dep't Ex. 13 at ¶¶ 3, 19, 22. She contributed personal funds to the business without directing that those funds be used to meet its tax obligations. Tr. 67.

Given her power and knowledge, the Petitioner was obligated to show that she took reasonable steps to make sure the taxes were paid, *see, e.g.*, *DiStasio v. United States*, 22 Cl. Ct. 36, 49 (1990) (finding responsible party did not act willfully where upon learning of tax deficiencies he entreated controlling shareholder to pay taxes, reasonably relied on assurance they would be paid and personally borrowed money to pay down outstanding tax bill); *Busey v. Dep't of Treasury*, 1989 WL 107387, at *3 (Dist. Idaho 1989) (holding restaurant manager not personally liable

for unpaid taxes where she turned over tax information to bookkeeper and instructed bookkeeper to maintain separate accounts and pay taxes), or was prevented from do so, *see, e.g.*, *Campbell v. Nixon*, 207 F. Supp. 826, 830 (E.D. Mich. 1962) (holding taxpayer not did not act willfully in failing to remit tax where he was prevented from doing so by the actions of other persons in the corporation). The Petitioner's testimony that she relied on Reginaldo's assurances that he was hiring a marketing company to increase business is not enough. *See, e.g.*, *Matthew May v. Ill. Dep't of Revenue*, 14 TT135 at 9 (Dec. 28, 2015) (holding one-time admonishment of corporate president's business practices was not sufficient to avoid responsible person's liability).

Petitioner also contends that her "illness alone negated any argument that she acted willfully." Pet'r Br. at 6-7 (citing *Sherwood v. United States*, 246 F. Supp. 502 (E.D.N.Y. 1965). In *Sherwood,* a taxpayer was described as "incapacitated by illness" during the tax period question, and thus "not in a position to act with respect to the corporation's financial condition or to make any decisions concerning payments to creditors." *Id.* at 507-508. Here, the Petitioner was not incapacitated by illness during the tax periods in issue. She returned to work during those periods and regularly participated in Alliance's financial decision making.

It is not "inconsistent and disingenuous," as Petitioner argues, for the Department to seek to collect the same withholding taxes from the Petitioner for which Reginaldo was criminally convicted. Pet'r Br. at 12; Pet'r Mem. of Law Addressing Supplemental Authority at 3-4. Petitioner cites a case holding that a taxpayer criminally convicted for failing to remit withholding taxes was estopped from seeking a refund in a civil action for the same taxes. *McClain v. McClain*, 2018 WL 1419082, at *5 (D. Mont.). That is a far cry from present case, where the Department is trying to collect taxes from a responsible party. That Reginaldo is also a responsible party does not preclude the Department from satisfying an outstanding withholding tax liability from other responsible officers of Alliance, such as the Petitioner. *See McLean,* 326 Ill. App. 3d at 677-78.

Conclusion

The October 6, 2014 Notice of Penalty Liability for the periods ending March 31, 2013, June 30, 2013, September 30, 2013, December 31, 2013 and March 31, 2014 is affirmed in its entirety. The January 9, 2015 Notice of Penalty Liability for the periods ending June 30, 2014 and September 30, 2014 is affirmed in its entirety.

This is a final order subject to review under section 3-113 of the Administrative Review Law, and service by email is service under section 3-113(a). The Illinois Independent Tax Tribunal is a necessary party to any appeal.

s/ *Brian Barov*
BRIAN F. BAROV
Administrative Law Judge

Date: May 20, 2020